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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO,

In Opposition To Petition For A Writ of Certiorari To The Supreme Court of Ohio.

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Constitution.

No portion of the Constitution of the United States is quoted specifically in this Brief. Those portions which the petitioner quotes in his Petition for a Writ of Certiorari to the Supreme Court of Ohio are incorporated herein by reference ---- 1

Reference is made in this Brief to Amendment XIV, sec. 1 ---- 2

Statutes.

28 U. S. C. 1257 (Act of June 25, 1948, c. 646, sec. 1) ----1, 2, 6, 11

No other statute is quoted specifically in this Brief. Those quoted by the petitioner in his Petition for a Writ of Certiorari to the Supreme Court of Ohio are incorporated herein by reference---- 1

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REPORTS OF OPINIONS IN LOWER COURTS.

The opinion of the Supreme Court of Ohio, in addition to being printed in 172 Ohio State at page 269, is also printed in 175 Northeastern Reporter, Second Series, page 59 and in 15 Ohio Opinions, Second Series, page 449.

STATEMENT OF JURISDICTION.

The respondent adopts and incorporates herein by reference the Statement of Jurisdiction as printed on pages 1 to 2 of the petitioner's Petition for a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The respondent adopts and incorporates herein by reference that portion of the petitioner's Petition for a Writ of Certiorari which is included under the heading, "Constitutional Provisions and Statute Involved," on pages 3 and 4 of such Petition. In addition, the respondent cites that portion of 28 United States Code 1257 (Act of June 25, 1948, c. 646, sec. 1) which reads as follows, namely,

"1257. STATE COURTS—APPEAL—CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court, as follows:

(3) By writ of certiorari. * * *"

QUESTIONS PRESENTED FOR REVIEW.

1. Was the petitioner, an attorney, denied due process of law when he was convicted of contempt of court, and sentenced therefor, for advising his clients to violate an *ex parte* temporary restraining order, issued by a State trial court, which prohibited picketing by employees at the premises of an employer in violation of the "no Picketing" clause in a collective bargaining contract?

2. Did the State trial court, when it so convicted and sentenced the petitioner for contempt of court, act in so arbitrary and unfair a manner as to violate the "Due Process" clause of the Fourteenth Amendment to the Constitution of the United States?

3. Was the State trial court deprived of its jurisdiction to enjoin the violation of a "no picketing" clause in a collective bargaining contract simply because an "unfair labor practices" charge, having nothing to do with such contract had been filed with the National Labor Relations Board?

STATEMENT OF THE CASE.

The respondent adopts and incorporates herein by reference the "Statement of the Case" which is printed on pages 4 through 16 of the Petition for a Writ of Certiorari herein, subject, however, to the following emendations:

1. After the trial court had issued an *ex parte* restraining order (R. 3, 5, 14, 15, 20, 22, 45-57) which forbade the clients of the petitioner to violate a "no picket-

ing" clause in a collective bargaining contract, the petitioner told his clients that in his opinion such restraining order was illegal *and he also advised his clients to disobey the restraining order* (R. 28, 29, 30, 33). In earlier hearings upon this case, both the Ohio Supreme Court (Appendix A to Petition for a Writ of Certiorari herein, page 36) and the Ohio Court of Appeals (Appendix B to same Petition, page 43), recognied this fact that the petitioner had not only advised his clients as to their rights, but had also advised his clients to disobey the court order. After the officials of the union, acting upon advice of the petitioner, decided to violate the restraining order, the petitioner himself called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets (R. 50, bottom paragraph).

2. The petitioner, on May 31, 1960, told the trial court that he, the petitioner, had prepared a motion to vacate the temporary restraining order but he refused to file it unless the court would grant him an early hearing upon such motion (R. 53).

3. The "unfair labor practices" charge which had been filed with the National Labor Relations Board contained vague charges that the employer had refused to bargain collectively, although in fact negotiations had been under way almost continuously (R. 4). Such "unfair labor practices" charge was not based upon the collective bargaining agreement between the employer and the clients of the petitioner (R. 4). Such charge was dropped prior to the Ohio Court of Appeals hearing on June 9, 1960 (R. 3, 4).

4. The trial court, on Friday, June 3, 1960, told the petitioner that he ought to select a lawyer to represent him and that if the petitioner did not do so, the trial court would appoint such an attorney (R. 34, 35).

5. Although the trial court refused to permit the petitioner to testify under oath (R. 42), the trial court permitted the petitioner's lawyer to read into the record what the petitioner would testify if allowed to testify under oath (R. 43 through 54).

ARGUMENT.

I.

Since the National Labor Relations Board has never been given authority to enforce a collective bargaining contract, the mere existence before the National Labor Relations Board of an unfair labor practices charge did not deprive a state court of jurisdiction to enforce a "no picketing" clause in such a contract.

"It is significant, however, that breach of contract is not an 'unfair labor practice.' A proposal to that end was contained in the Senate bill, but was deleted in conference with the observation: 'Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board' (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42)." *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, footnote 2 on pages 443-444.

A State court may enjoin the violation of a "no picketing" clause in a collective bargaining agreement. *McLean Distributing Co. v. Brewery & Beverage Drivers Local*, 254 Minn. 204, 94 N. W. 2d 514; certiorari denied, 360 U. S. 917.

II.

Since the Trial Court had the right to determine its own jurisdiction when it issued the temporary restraining order, the petitioner was obliged to obey such order even if such order eventually proved to be beyond the jurisdiction of the court.

The leading case on this point is *United States v. Shipp*, 203 U. S. 563. On page 573, this Court therein said:

> "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this court had no jurisdiction of the appeal, this court, and this court alone, could decide that such was the case. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. * * * Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition. * * *"

After the *Shipp* case, this Court reiterated the rule that a court has authority to decide whether it has jurisdiction in this kind of a situation; and that pending such decision people must obey its orders. *Toy Toy v. Hopkins*, 212 U. S. 542, 548; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450; *Howat v. Kansas*, 258 U. S. 181. In the *Howat* case, this doctrine was spelled out even more clearly in the following words beginning on page 189,

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going

to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."

Again, in 1947, in *United States v. United Mine Workers of America*, 330 U. S. 258, this Court restated the above rule and repeated the above quotations from the *Shipp* case (page 291) and the *Howat* case (page 293).

III.

Since a temporary restraining order, even though affirmed by the highest court of a state, is not a "final judgment or decree" which may be reviewed by this Court pursuant to 28 U. S. C. 1257, it is improper for the petitioner to attack the validity of such temporary restraining order at the present time in this Court.

28 U. S. C. 1257 (Act of June 25, 1948, c. 646, sec. 1, 62 Stat. 929) provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari * * *."

Since the time of *Gibbons v. Ogden*, 6 Wheaton, 448, this Court has refused to accept jurisdiction of interlocutory decrees, since they are not "final decrees" within the terms of 28 U. S. C. 1257. In 1952, this Court said:

"The distinction between a preliminary or temporary injunction and a final or permanent injunction was elementary in the law of equity. The classical concept was at once recognized and applied in *Gib-*

bons v. Ogden, supra. There is no room here for interpretation. The rule remains unchanged.

"True, as long as a temporary injunction is in force it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari."

Montgomery Building & Construction Trades Council et al. v. Ledbetter Erection Co., Inc., 344 U. S. 178, 180.

In the present instance, the order issued by the trial court was a temporary restraining order (R. 3, 5, 14, 15, 20, 22, 45, 46, 47). Therefore it is not reviewable by this Court. This Court ought not to hear any argument which the petitioner may seek to make as to the validity of such temporary restraining order.

IV.

Since the petitioner was given all of the safeguards enumerated in In re Oliver, 333 U. S. 257, and relied upon by the petitioner on page 20 of his petition for a writ of certiorari, he was not deprived of any of his constitutional rights in being convicted of contempt by the State Trial Court.

On page 20 of his petition, the petitioner cites *In re Oliver*, 333 U. S. 257, the Michigan "One Man Grand Jury" case, wherein this Court said that a defendant in indirect contempt proceedings is guaranteed

(1) The right to reasonable notice;

(2) The right to a trial. (Actually in *In re Oliver*

the Court said that he was entitled to a *public* trial as distinct from one conducted privately.);

(3) A reasonable opportunity to defend himself;

(4) The right to testify and be heard in his defense; and

(5) The right to examine witnesses.

The petitioner was not deprived of any of these rights.

(1) He had reasonable notice. Throughout the entire period from May 27, 1960 through June 7, 1960, the petitioner was fully aware of what was being done in the Lucas County, Ohio, Trial Court. He knew about the temporary restraining order which forbade his clients to violate a "no picketing" clause in their own collective bargaining contract. He knew what he was doing when he advised them to violate such order (R. 28, 29, 30, 33, 36).

(2) He had public hearings on June 1, June 3 and June 7 which constituted in substance a trial for his offense of contempt of court.

(3) He had throughout such hearings a reasonable opportunity to defend himself. In fact the trial court told him that he ought to be represented by counsel and that if he did not select a counsel, the trial court would appoint one (R. 34, 35).

(4) Any objection which the petitioner might have had to the refusal of the trial court to permit him to testify under oath (R. 42) was waived when his counsel asked leave to read, and was allowed to read, into the record what the petitioner would have testified had he been allowed to take the stand (R. 43 through 54).

(5) There is not the slightest reason to assume that the petitioner would not have been allowed to examine witnesses if any had been called. No witnesses in the contempt proceedings were called since the petitioner, in such proceedings in open court, freely admitted that he had advised his clients to disregard the temporary restraining order which forbade them to violate a "no picketing" clause in their own collective bargaining contract (R. 28, 29, 30, 33).

The Ohio Court of Appeals and the Ohio Supreme Court both considered at length the matter of the petitioner's constitutional rights. Both courts agreed that such rights had not been violated (Appendices A and B to petitioner's Petition for a Writ of Certiorari, pages 31 (Ohio Supreme Court) and 41 (Ohio Court of Appeals)).

V.

This case is important only to the individual involved and has no general importance; and it was decided justly by two Ohio courts of appellate jurisdiction.

This case turns upon a peculiar factual situation. It is not of general importance. It is important only to the petitioner as an individual. It does not concern the National Labor Relations Board in any way. Even before the hearing in the Ohio Court of Appeals on June 9, 1960, the "unfair labor practices" charge had already been dismissed (R. 3, 4). A search of the authorities has failed to disclose a case where the facts presented are similar to those in the instant case. Therefore this case is not important to the profession as a whole. The record shows that the petitioner deliberately and knowingly elected to take a short-cut rather than to take the longer but more conventional path

(R. 28, 29, 30, 33, 36). He had prepared a motion to vacate the preliminary restraining order but did not file it because the trial court would not promise him an early hearing (R. 53). In his impatience, the petitioner elected to advise his clients to disobey that which in fact proved to be a valid order. In addition he served as a link in the chain of communication by which the decision of the heads of the labor union to disobey the order was transmitted to the local members (R. 50). These acts of his were clearly contemptuous.

The decision of the Ohio Supreme Court was right and just when it affirmed the decisions of the lower courts. Each of the two Ohio appellate courts carefully considered the matter of the petitioner's constitutional rights. He argued before each court in turn that he had been deprived of due process. Each court after careful study decided that there was no merit in his contention. Even the dissenting judges did not question the fact that the petitioner's constitutional rights had been protected (Appendices A and B to Petition For a Writ of Certiorari, pages 37-38 and 47-51 respectively). Neither of the dissenting judges indicated that there was any merit in the claim of the petitioner that he had been deprived of due process. This Court should not upset the decision of the Ohio Supreme Court.

CONCLUSION.

SINCE:

The jurisdiction of the State trial court to issue this temporary restraining order which the petitioner advised his clients to disobey was never taken away from such court and vested in the National Labor Relations Board;

The trial court had the right to determine its own jurisdiction when it issued the temporary restraining order which the petitioner advised his clients to disobey;

A temporary restraining order is not a final decree and therefore may not be reviewed by this Court pursuant to 28 U. S. C. 1257;

The manner wherein the State trial court found the petitioner to be guilty of contempt of court and imposed sentence upon him, did not violate any of the rights of the petitioner under the Constitution of the United States;

This case lacks general importance; and

The Supreme Court of Ohio acted fairly and justly in sustaining this conviction of contempt of court;

THEREFORE the prayer of the petitioner for the granting of a writ of certiorari should be denied.

Respectfully submitted,

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